Supreme Court, U.S.
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No.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1998

CHUKWUKA R. ACHEBE,

Petitioner,

vs.

CHICAGO BOARD OF EDUCATION,

Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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32 pp

QUESTIONS PRESENTED

1. Whether the Seventh Circuit Court erred in concluding that plaintiff has failed to meet the fourth prong of that criteria; that is, has not established that others who were not in the protected class received more favorable treatment; in violation of Title VII of the Civil Rights Act of 1964; 42 U.S.C. §2000e-2(a)(1).

2. Whether the Seventh Circuit Court erred in not believing that Mr. Kohnen's decision to terminate Mr. Achebe and not rehire him as an electrical engineering consultant was pretextual; in violation of Title VII of the Civil Rights Act of 1964; 42 U.S.C. §2000e-2(a)(1).

3. Whether the Board of Education is in violation of Title VII of the Civil Rights Act of 1964; 42 U.S.C. §2000e-2(a)(1) when it retained a less qualified individual, Mr. Brian Gouwens, a white male, U.S. citizen when they fired the plaintiff as a career service employee; and hired a less qualified individual, Mr. John Thames, a black American male, to do the work the plaintiff had been doing as a full time employee, as an engineering consultant though plaintiff had telephoned for the position; and the Seventh Circuit Court affirmed this.

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Chukwuka R. Achebe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit below was rendered on December 4, 1998 and is unpublished. Petitioner's timely filed Petition for Rehearing was denied by order dated December 31, 1998. The order of the District Court entering final judgment is unreported and is dated May 22, 1997. These decisions are reproduced as Appendices A, B, and C, respectively.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The petition has been filed within ninety days of December 31, 1998, the date on which the Seventh Circuit denied petitioner's timely filed Petition for Rehearing.

STATUTE INVOLVED

Achebe claims that the Board fired and failed to rehire him because he is black and Nigerian, in violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(a)(1).

STATEMENT OF THE CASE

Achebe, a native of Nigeria, came to the United States in 1965. Achebe earned a Bachelor of Science degree in Electrical Engineering from California Polytechnic State University in San Luis Obispo, California in 1970 and a master's degree in Electrical Engineering from the University of Wisconsin in 1975. Achebe became a naturalized. U.S. citizen in 1995.

Achebe was employed by the Board as an Electrical Engineer IV in the Bureau of Architecture from 1986 to September 1991. Achebe had 15 years of private sector employment. Achebe's primary job duties involved designing fire alarm systems. Performance evaluations were given to bureau employees by their supervisors. Board policy did not allow the Bureau Director to change performance evaluations. But Mr. Norton, the Bureau Director then, lowered the performance evaluation given by Achebe's immediate supervisor, Mr. Roger McKeague in 1986 against the Board's policy. (Exhibits 3, 4, Tr. P.16-17)[1] Mr. Norton lowered Achebe's performance evaluation in 1989. (Exhibit 17, Tr. P.30-32).[2] In 1989, Achebe and three other black employees wrote a letter to Board Superintendent Manfred Byrd complaining that Norton had lowered their performance evaluations on the basis of race. In response, the Board directed Norton's boss, James Harney, the Director of the Department of Facilities, to review the four employees' evaluations for the 1989-90 school year. In 1990, Norton

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[1]All references to the trial transcript will be Tr. with the appropriate page number(s).

[2]Achebe obtained copies of trial transcripts.

recommended to Harney that Achebe be fired because of his poor performance, but Achebe was not fired. Norton was forced to resign in May 1990. Daniel Kohnen (an architect) succeeded Norton. In 1991 Mr. Wadwa, a mechanical engineer, who was Achebe's supervisor, gave Achebe a higher performance evaluation.

At the time Achebe was employed with the Board, the Board had to balance its budget prior to the start of the school year so that it could open the schools. In August 1991, Harney directed Kohnen to eliminate seven people in his bureau in order to help balance the Board's budget. Achebe, three other black employees and three white employees, were terminated. From the trial transcripts, the following employees were retained as career service employees in the Electrical Engineering Department.

1. Mr. Kohnen retained Mr. Manny Lal of Indian origin, who has a BSEE degree and a professional licence.

2. Mr. Kohnen retained Mr. Charlie Kandallu, also of Indian origin, who has a BSEE degree and a professional license.

3. Mr. Kohnen also retained Mr. Brian Gouwens, a U.S. white male citizen. Mr. Gouwens has a high school diploma and is not a licensed engineer. (Exhibit 54 Tr. P.190).

4. Mr. Kohnen terminated Achebe's appointment as a career service employee. Achebe has BSEE and MSEE degrees in electrical engineering. Achebe has no professional engineer's license. Achebe is more qualified than Mr. Brian Gouwens who was retained. (Tr. P.192).

Achebe contacted Mr. Kohnen over the telephone from September 1991 to 1992 for an electrical consultant position. (Tr. P.188-190).

1. Mr. Achebe, an African-Nigerian Electrical IV, was fired as a career service employee and was not rehired as an electrical consultant (Tr. P.192). Achebe has both BS and MS degrees in electrical engineering.

2. Ray Linke, a white American male Architect IV, without registration as Achebe, retained his career service position, but was rehired as an Architect Consultant a year later on retirement (Tr. P.198-199.) Mr. Ray Links has a BS degree in Architecture.

3. Mr. Francis Trapp, a white American male, a Mechanical Engineer, was terminated like Achebe, from his career service position. In 1991 he was rehired as a Mechanical Engineer Consultant by Mr. Kohnen (Tr. P.192-193). Mr. Trapp has a BS degree in mechanical engineering and has no professional engineering license.

4. Roderick Bailey, a black American Architect II, who has a BS degree in Architecture but has no professional lience, was fired and rehired as an Architectural Consultant by Mr. Kohnen. (Tr. P.192-193).

5. Ms. Ursula Ross, a white System Engineer, was fired with Mr. Achebe, was rehired as a math teacher (Tr. P.193). Ms. Ross has a BS in mathematics.

6. Miss Patricia Edwards was fired and rehired (Tr. P.193). Ms. Edwards has a high school diploma and is a black American female.

7. Mr. John Thames, a high school graduate, without engineering license, was hired by Mr. Kohnen as an Electrical Consultant to perform the same duties that Achebe had performed as a career service employee. Mr. Thames was paid more money than Achebe had been paid (Exhibit 54, Tr. P.194-195). Mr. Thames is a black American.

The District Court, after a bench trial, entered judgment for the Board. The court found that Achebe had failed to meet his prima facie burden to show intentional discrimination because he had not shown that similarly situated people outside of his protected class were treated differently than he. The court also found that even if Achebe had met his prima facie burden, Achebe had failed to prove that the Board's asserted non-discriminatory reason for firing him was pretextual. In a decision dated December 4, 1998, the Seventh Circuit affirmed the judgment of the District Court. (Appendix A)

On December 18, 1998, Achebe filed a timely Petition for rehearing with a suggestion for rehearing In Banc. By order dated December 31, 1998, the Seventh Circuit denied the petition. (Appendix B)

REASONS FOR GRANTING THE WRIT

Achebe claims that the Board fired and failed to rehire him because he is black and Nigerian, in violation of Title VII of the Civil Rights Act of 1964.Title VII makes it unlawful for an employer to fail or refuse to hire or "to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of

employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(1).

Achebe has not offered any direct evidence of illegal motive, but instead has chosen to show discrimination indirectly through the burden shifting method established by the Supreme Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973). The burden shifting method of proof involves three steps. First, a plaintiff must establish a prima facie case of discrimination. *Burdine*, 450 U.S. 248, 252-53. A prime facie case consists of the following four elements: (1) that the plaintiff belongs to a protected group, (2) that he performed his jobs satisfactorily, (3) that he was subjected to adverse employment action, and (4) that similarly situated employees received more favorable treatment. *Johnson v. City of Fort Wayne, Indiana*, 91 F.3d 922, 931 (7th Cir. 1996). The fourth element specifically entails showing whether similarly situated employees not in the protected class were treated more favorably than the plaintiff. *Williams*, 856 F.2d at 923; *Jackson v. Cook County*, No. 93-C-4829, 1995 WL 461758, at *3 and *4 (N.D. Ill. Aug. 1, 1995).

Second, establishing a prima facie case creates a rebuttable presumption of discrimination and the burden of production shifts to the employer to articulate a legitimate, nondscriminatory reason for its employment decision. *Johnson* 91 F.3d 922, 931. (7th Cir. 1996). Third, if the employer meets its burden of production, the presumption of discrimination dissolves; in order for the employee to prevail, he must demonstrate that the employer's nondiscriminatory explanation is a mere pretext for discrimination. *Id.*

A plaintiff can show pretext by producing evidence from which a rational factfinder could infer that the employer lied about its reasons for its actions towards the employee. *Weisbrot v. Medical College of Wisconsin*, 79 F.3d 677, 682 (7th Cir. 1996). A plaintiff need not produce evidence of intentional discrimination. *Id* at 681-82. An employee can establish pretext directly by showing one of the following (1) that the defendant's explanation had no basis in fact, (2) that the proffered explanation was not the real reason for the adverse job action, or (3) the stated reason was insufficient to warrant the action. *Johnson,* 91 F.3d at 931.

The parties agree that Achebe has satisfied the first three elements of his prima facie case, but disagree on the fourth prong. Therefore, the first issue for resolution is whether Achebe has satisfied the fourth prong by showing that similarly situated employees outside of his protected class were treated more favorably than he was. The Seventh Circuit has stated that the four prongs of a prima facie Title VII case "present a low hurdle" for a plaintiff to clear. *Hughes v. Brown*, 20 F.3d 745, 746 (7th Cir. 1994). Achebe has made a prima facie case. Achebe has shown sufficient facts to raise a question for the court with regard to pretext.

I. PRIMA FACIE CASE – Whether the Seventh Circuit Court erred in concluding that plaintiff has failed to meet fourth prong of that criteria; that is, has not established that others who were not in the protected class received more favorable treatment; in violation of Title VII of the Civil Rights Act of 1984; 42 U.S.C. § 2000e-2(a)(1)

As a threshold matter, examine whether Achebe has satisfied the fourth element of his prima facie case: whether

other similarly situated employees not in his protected class were treated more favorable in the Board's firing and rehiring decisions. Achebe has satisfied this element.

A plaintiff can make out a prima facie case where he is "qualified for reinstatement but was denied, while a similarly situated employee outside of [his] protected class, and with a similar work history, was reinstated." *Timms v. Frank*, 953 F.2d 281, 286 (7th cir. 1992). *See also*, *Jackson* 1995 WL 461757, at *3 (plaintiff made a prima facie case by identifying one person outside the protected class who was more favorably treated than plaintiff). In this case, Mr. Brian Gouwens, a white American male, who has a high school diploma without engineering license was retained by Mr. Kohnen as a career service employee in the electrical engineering department (Exhibit 54, Tr. P.190), while Mr. Achebe who has BS and MS degrees in electrical engineering was terminated (Exhibit 54, Tr. P.192). Also, Francis Trapp, a white mechanical engineer in the Bureau who was fired along with Achebe in 1991, was later rehired as a mechanical engineering consultant (Exhibit 54, Tr. P.192-193), whereas Achebe, an electrical engineer, was never rehired as an electrical engineering consultant. (Exhibit 54, Tr. P.192), despite the fact that Mr. Achebe called Mr. Kohnen several times on the telephone from September 1991 to 1992 when the electrical engineering position was available. Furthermore, the Board hired Mr. John Thames, a high school graduate and a black American male electrical design consultant, (Exhibit 54, Tr. P.194-195) in April 1992 to perform the same duties that Achebe had performed as a full time employee. Evidence showed that Achebe was more qualified than Mr. Thames. Also, Achebe held electrical engineering degrees whereas Mr. Thames was a high school graduate. The Board also contended that Achebe performed his job satisfactorily (Tr. P.188). Nevertheless, the Board hired

Thames to perform Achebe's job on a consultant basis, rather than hiring Achebe to perform the same job on a consultant basis.

Since the Board retained Mr. Brian Gouwens as a career service employee instead of Achebe and rehired Trapp to work as a consultant in his particular field of expertise, but did not rehire Achebe for his respective field, Achebe has identified similarly situated white employees who were treated more favorably than Achebe.

It is true that Bailey, an African-American architect who was discharged along with Achebe, was later rehired as an architecture consultant (Tr. P.192-193), but Bailey is not of Nigerian origin. Furthermore, Williams, the only African-Nigerian Bureau employee identified in the record besides Achebe, was not fired from his position as a civil engineer in 1991, but was discharged in the Fall of 1995 during further Board budget cuts. While these two individuals represent black employees who did not share Achebe's fate during and following the Board's 1991 budget cuts, these employees are not the proper focus of prima facie analysis. The fourth prong of a prima facie case asks whether similarly situated employees *outside of* plaintiff's protected class received more favorable treatment than plaintiff. *Williams*, 856 F.2d at 923. Because Achebe has identified such individuals–Brian Gouwens and Trapp–Achebe has satisfied his burden.

II. PRETEXT – Whether the Seventh Circuit Court erred in not believing that Mr. Kohnen's decision to terminate Mr. Achebe and not rehire him as a consultant was pretextual, in violation of Title VII of the Civil Rights of 1964, 42 U.S.C. § 2000-2(a)(1).

Since Achebe has established his prima facie case, the burden switches to the Board to articulate a legitimate nondiscriminatory reason for firing and failing to rehire Achebe.

The Board has satisfied its burden of production by providing evidence of a cost-cutting reduction in force ("RIF"). The Seventh Circuit Court has recognized donwsizing as a legitimate nondiscriminatory reason for discharging an employee. *Oxman v. WLS-TV*, 846 F.2d 448, 456 (7th Cir. 1988); *Jackson*, 1995, at #4. RIFs may explain both why an employee is fired and why he is not rehired –if an employer lacks the funds to keep an employee on staff, presumably the employer also lacks the funds to hire that employee back. Furthermore, the Board states that Achebe's position as Electrical Engineer IV, which did not require an engineering license, could be eliminated because the work normally performed by someone in that position could be handled by the remaining licensed engineers. The burden than moves back to Achebe to prove that the RIF was a mere pretext for discrimination. Achebe has produced evidence from which a rational factfinder could infer that the Board lied about its reasons for firing and failing to rehire Achebe, as a consultant, *Weisbrot*, 79 F.3d 677, 682 (7th Cir. 1996). Achebe argues that the RIF was not the real reason for the Boards actions. Examples:

1. Mr. Kohnen retained Mr. Manny Lah, who has a BS degree and a professional engineering license.

2. Mr. Kohnen retained Mr. Charlie Kandallu, who has a BS degree and a professional engineering license.

3. Mr. Kohnen retained Mr. Brian Gouwens, who is a white male American citizen. Mr. Gouwens has a high school diploma and has no professional engineering license. (Exhibit 54, Tr. P.190)

4. Mr. Kohnen fired Mr. Achebe, who has BS and MS degrees in Electrical Engineering (Exhibit 54, Tr. P.192). Mr. Achebe is more qualified than Mr. Gouwens and should have been retained by Mr.Kohnen instead of Mr. Brian Gouwens.

Because Trapp, a white employee who has a BS in mechanical engineering, was treated more favorably than Achebe, and because Thames, a black a high school graduate, was hired to perform Achebe's job on a consultant basis instead of Achebe, who has BS and MS degrees in electrical engineering, Achebe has shown sufficient facts to show that the Board's RIF was not the true reason for its actions towards Achebe. Achebe called Mr. Kohnen several times on the telephone for the job from 1991 to 1992 (Tr. P.188).

An RIF may justify firing employees, and if there are no new positions available following a downsizing, an employer can hardly be expected to rehire discharged workers. However, in this case, while the Board cut seven jobs in the Bureau in order to help balance the budget for the 1991-92 school year, in April 1992, during the same academic year, the Board had enough funds to hire Thames, a high school graduate, as an electrical engineering consultant to perform the same duties that Achebe, who has MS and BS degrees in electrical engineering, had performed as a full time employee. In addition, after the 1991 RIF, the Board rehired Trapp as a consultant to perform the same duties that he had performed as a full time employee. The question remains, then, why the Board did not rehire Achebe to work as an electrical engineer on a consultant basis. The Board had the funds to hire an electrical engineering consultant, within the 1991-92 budget year, but it hired Thames, a high school graduate without license, instead of Achebe, who has BS and MS degrees in electrical engineering.

III. Whether the Board violated 42 U.S.C. § 2000e-2(a)(1) by retaining a less qualified white male, U.S. citizen, when Achebe was fired and rehired a less qualified black U.S. citizen, as Achebe's replacement as an electrical consultant though Achebe had contacted Mr. Kohnan for the position.

The Seventh Circuit panel said that Achebe fails to show that the district court's finding of no discrimination is clearly erroneous and that the district court credited Kohnen's testimony that he neither terminated nor failed to rehire Achebe for discriminatory reasons.

In response, Achebe refers this court to the direct cross examination of Mr. Kohnen by Mr. Kolehmaiden (Achebe's attorney at the district court trial):

Kolehmaiden: So Achebe was not–he did not leave, he was not discharged because there was no work for Achebe to do, that's true, isn't it?

Kohnen: Yes that is true (Tr. P.188)

Kolehmaiden: And Achebe was not discharged, as far as you know, because of unsatisfactory performance?

Kohnen: Correct, he was not. (Tr. P.188)

Kolehmaiden: Now, after Mr. Achebe left, he did telephone you and ask for work?

Kohnen: He may have, but I don't remember that neither (Tr. P.188)

Kolehmaiden: Now, when you were testifying in response to questions by the attorney for the Board, I believe you said that one factor you considered was that you kept people that were licensed engineers in preference to Mr. Achebe who was not a licensed engineer. (Tr. P.190)

Kohnen: Yes.

Kolehmaiden: There were three of those individuals who had the authority to stamp these drawings or seal these drawings that you kept?

Kohnen: No, on the electrical engineering side, there were two licenses and then Brian Gouwens did not have a license. (Tr. P.190)

Kolehmaiden: As a matter of fact, after you brought Mr. John Thames back, he was paid more than Mr. Achebe had been paid doing the same work, is that correct? (Tr. P.195)

Kohnen: I believe that is correct. (Tr. P.195)

Kolehmaiden: And you hired Mr. Thames back. You did not even know if he was a degreed engineer like Mr. Achebe. Am I correct?

Kohnen: It is true that I do not know whether Mr. Thames is a degreed engineer. (Tr. P.195).

Honorable jurists, Mr. Kohnen retained the following individuals in the electrical engineering department as career service employees.

1. Mr. Manny Lal of Indian origin, who has a BS in Electrical Engineering, and a professional engineering license.
2. Mr. Charlie Kandallu, also of Indian origin, who has a BS in Electrical Engineering and a professional engineering license.

3. Mr. Brian Gouwens, who is a white American male. Mr. Brian Gouwens has a high school diploma (Exhibit 54, Tr. P.190) and has no professional engineering license. Mr. Kohnen terminated Mr. Achebe's appointment as a career service employee. Mr. Achebe has BS and MS degrees in Electrical Engineering, though no professional engineering license. (Exhibit 54, Tr. P.192) Mr. Achebe is more qualified than mr. Brian Gouwens both in education and experience and should have been retained instead of Mr. Gouwens (Exhibit 54,

Tr. P.190) This is discrimination because Mr. Achebe was Nigerian and black and Mr. Gouwens is white and American.

4. All of the persons terminated with Achebe in 1991 were rehired as consultants, while Achebe was not. (Tr. P.192)

5. Mr. John Thames is a high school graduate and is not a licensed engineer. (Exhibit 54, Tr. P.195-197). Mr. Kohnen offered Mr. Thames an electrical consultant position. Mr. Achebe has BS and MS degrees in electrical engineering though he is not licensed. Achebe is a much more qualified electrical engineer than Mr. Thames. Still, Mr. Kohnen did not adhere to his criterion of keeping more qualified engineers in the department who could do the work. (Exhibit 54, Tr. P.192). Mr. Achebe was not rehired as an electrical engineering consultant. His was discrimination based on nationality.

Mr. Kohnen had said that he chose to fire Achebe because there were other degreed electrical engineers more qualified than Achebe. But rather, Mr. Kohnen kept Mr. Brian Gouwens as a career service employee, and hired Mr. John Thames as an electrical consultant. These actions by Mr. Kohnen constituted racism to me and were done because I was a black from Nigeria then.

Mr. Kohnen was aware through my telephone calls that I was available for the electrical consultant position. He retained a less qualified individual, Mr. Brian Gouwens, when he fired me and he hired a less qualified individual, Mr. John Thames, as a consultant to do the work I had being doing.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 97-2411

CHUKWUKA R. ACHEBE,
Plaintiff-Appellant,

v.

CHICAGO BOARD OF EDUCATION
Defendant-Apellee.

Submitted November 19, 1998*
Decided December 4, 1998

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division; Patrick J. Duggan, Judge (No. 94 C1551).

Before: CUMMINGS, WALTER J.; FLAUM, JOEL M.; and EASTERBROOK, FRANK H.; Circuit Judges.

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*After an examination of the briefs and record, we have concluded that oral argument is unnecessary. Therefore, this appeal is submitted on the briefs and record. See Fed. R. App. P. 34(a); Cir. R. 34(f).

ORDER

In this Title VII suit, Chukwuka Achebe appeals a judgment entered in favor of the Board of Education after a two-day bench trial. Achebe claims that the Board terminated him in 1991 and then failed to rehire him as a consultant because he is a black Nigerian, and in retaliation for a 1989 complaint that his performance evaluations had been lowered because he is black. The district court found that Achebe was terminated for budgetary reasons, and that Achebe had failed to establish either a prima facie case of discrimination or that the Board's asserted nondiscriminatory reason for terminating him was pretextual. We affirm.

Testimony at the trial established the following facts: Achebe, a native of Nigeria, is a naturalized citizen who came to the United States in 1965. He was employed by the Board as an Electrical Engineer IV in the Bureau of Architecture between 1986 and 1991. His primary job duties involved designing fire alarm systems. Performance evaluations were given to bureau employees by their direct supervisors, subject to approval by the bureau director. If the director of the bureau disagreed with the supervisor's evaluation, he could modify the evaluation. Richard Norton was bureau director until he resigned in May 1990. Daniel Kohnen succeeded Norton.

Achebe was never happy with any of his performance evaluations, and frequently challenged Norton about them. Many of these complaints were in writing, and none charged that race or ethnicity was the cause of the poor evaluations. In 1989, Achebe and three other black employees wrote a letter to Board Superintendent Manfred Byrd complaining that Norton had lowered their performance evaluations on the

basis of race. In response, the Board directed Norton's boss, James Harney, the Director of the Department of Facilities, to review the four employees' evaluations for the 1989-90 school year. In January 1990, Norton recommended to Harney that Achebe be fired because of his poor performance, but Achebe was not fired. After Norton resigned, Kohnen twice reviewed Achebe's performance evaluations and both times gave him higher performance ratings than Norton had.

At the time Achebe was employed with the Board, the Board had to balance its budget prior to the start of the school year so that it could open the schools. In August 1991, Harney directed Kohnen to eliminate seven people in his bureau in order to help balance the Board's budget. Achebe, three other black employees and three white employees were terminated. Kohnen decided to lay off Achebe because his work could be reassigned to the bureau's two other electrical engineers, both of whom were licensed professional engineers, unlike Achebe. Another black Nigerian on the staff, Jalile Williams, was not laid off at this time. He remained with the bureau until the entire bureau was phased out in 1995.

Five of the seven who had been laid off were rehired by the Board either as employees or consultants during the 1991-92 school year. The district court found that at the time he was laid off, Achebe was not promised that he would be rehired as a consultant. During the 1991-92 school year, the department faced a backlog of fire alarm design work similar to the work Achebe had done prior his termination. Kohnen hired a black consultant, John Thames, to do the work. Thames, like Achebe, was not a licensed professional engineer.

The district court, after a bench trial, entered judgment for the Board. The court found that Achebe had failed to meet his prima facie burden to show intentional discrimination because he had not shown that similarly situated people outside of his protected class were treated differently than he. The court also found that even if Achebe had met his prima facie burden, Achebe had failed to prove that the Board's asserted non-discriminatory reason for firing him was pretextual. Achebe now appeals.

Whether or not Achebe has shown intentional discrimination is a finding of fact that we review for clear error. *See* Fed R. Civ. P. 52(a); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985); *Pirajno v. International Orientation Resources, Inc.*, 137 F.3d 987, 990 (7th Cir. 1998). When the factfinder chooses between two permissible views of the evidence, the choice cannot be clear error. *See Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863, 868 (7th Cir. 1995).

Achebe complains about two separate adverse employment actions: his termination and the subsequent failure to rehire him as a consultant. As to both he fails to show that the district court's finding of no discrimination is clearly erroneous. Regardless of whether Achebe met his prima facie burden, the district court credited Kohnen's testimony that he neither terminated nor failed to rehire Achebe for a discriminatory reason. We will not upset the district court's credibility determinations except in the most extreme circumstances. *See In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998).

Achebe fails to show that Kohnen's testimony was incredible as a matter of law. Kohnen stated that he fired

Achebe for budgetary reasons, and that he chose to fire Achebe because there were other more qualified electrical engineers in the department who could do his work. Achebe argues that the budgetary explanation is contrary to fact because some of the workers terminated in 1991, including a mechanical engineer and an architect, were rehired as consultants, but these facts do not show an inconsistency in Kohnen's testimony. None of the workers laid off in 1991 were ever rehired as career employees. Kohnen explained at trial that consultants were hired on an as-needed basis, and paid out of a different area of the budget. Moreover, Achebe offered no evidence that Kohnen discriminated against him when he hired Thames as a consultant during the 1991-92 school year. Kohnen testified that Thames was a former Board employee who submitted a resume at a time when Kohnen had a need to fill. Kohnen testified that he never promised to rehire Achebe as a consultant, and never was under an obligation to do so. Achebe never reapplied to the Board after he was fired, and Kohnen stated that he did not think about Achebe when he filled the consultant position. Thus, the district court did not clearly err when it found that Achebe did not prove that Kohnen had discriminated against him.

Therefore, the judgment of the district court is AFFIRMED.

APPENDIX B

[Filed Dec. 31, 1998]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 97-2411

CHUKWUKA R. ACHEBE,
Plaintiff-Appellant,

v.

CHICAGO BOARD OF EDUCATION
Defendant-Apellee.

Before: CUMMINGS, WALTER J.; FLAUM, JOEL M.; and EASTERBROOK, FRANK H.; Circuit Judges.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed by plaintiff-appellant on December 18, 1998, all of the judges on the panel have voted to deny rehearing and no judge in active service has requested a vote on the suggestion for rehearing en banc. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and and the same is hereby, DENIED.

APPENDIX C

[Decided May 22, 1997]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
CHICAGO, ILLINOIS 60604

No. 94 C 1551

CHUKWUKA R. ACHEBE,
Plaintiff,

v.

CHICAGO BOARD OF EDUCATION
Defendant.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JUDGE DUGGAN

THE COURT: The Court has listened carefully to the evidence presented in this case and has had-the benefit of the arguments by counsel.

In this case the plaintiff has the burden to persuade this Court that his termination from employment with the

A plaintiff asserting discrimination in employment based on race may prove his case by direct evidence of discrimination or by the application of the three step McDonnell Douglas procedure; that is, plaintiff establishes a prima facie case, defendant then may assert a nondiscriminatory reason, and if defendant does assert a nondiscriminatory reason, plaintiff then has the burden to persuade the Court that the asserted nondiscriminatory reason is a pretext. However, at all times the plaintiff has the burden of proving the discrimination; that is, the burden of proving that his employment was terminated because of his race or national origin.

In this Court's opinion, plaintiff has not established a prima facie case of discrimination. In order to establish a prima facie case of discrimination, he must establish,

One, that he is a member of a protected class;

Two, that he was qualified for a particular position and performed his job satisfactorily;

Three, that he was subjected to an adverse employment action; and.

Four, that others not in the protected clans received more favorable treatment.

In this Court's opinion, plaintiff has failed to meet the fourth prong of that criteria; that is, he has not established that others who ware not in the protected class received more favorable treatment. The evidence shows that those who were terminated at the same time that he was were both black and white. And there's no evidence, at least no persuasive

evidence, that any similarly situated white or non-Nigerian individual was retained; that is, received more favorable treatment. The Court is just simply saying that the evidence does not persuade this court that a similarly situated person received more favorable treatment.

Even if the plaintiff had established a prima facie case, the court is satisfied that the defendant has set forth a legitimate nondiscriminatory reason; that is, that he was terminated for budgetary reasons. And having asserted a legitimate nondiscriminatory reason, plaintiff has the burden to persuade this Court that the defendant's asserted reason was a pretext. This Court accepts the testimony of Mr. Kohnen that in the summer of 1991 he was charged with the responsibility of eliminating pos itions for budgetary reasons. And this court accepts the testimony of Mr. Kohnen that his decision to lay off Mr. Achebe was because Mr. Achebe and the others, who were laid of f at the same time, were the most expendable, i.e., or, that is, those whose job duties could be best absorbed by the remaining employees. The Court does not believe that Mr. Kohnen decision to terminate Mr. Achebe was pretextual. Plaintiff has, therefore, failed to meet his burden of proof to show that his discharge was based on race or national origin.

To the extent that plaintiff is attempting to prove that his discharge was racially motivated by "direct evidence," plaintiff's claim must, likewise, fail.

Plaintiff has offered evidence that Mr. Norton, Mr. Kohnen's predecessor, may have expressed a racial bias toward him, and there is evidence plaintiff had complained to Mr. Norton and others that he believed that he was being treated unfairly because of his race or national origin. However, even if the court accepts as true plaintiff's evidence

of racial bias on the part of Norton, or that plaintiff complained to Norton of unfair treatment based on race or national origin, or even if plaintiff complained to Mr. Kohnen, for that matter, that he, plaintiff, believed he was being treated unfairly because of race or national origin, plaintiff has not produced any persuasive evidence that Mr. Kohnen's decision to terminate him had anything whatsoever to do with his race or national origin. furthermore, this Court is satisfied that plaintiff's dissatisfaction with those evaluations, between 1986 and 1990, was a belief that he was being treated unfairly and that these poor evaluations were because he was being evaluated by persons who either were not his supervisors or that he. was being evaluated by persons not familiar with his work.

This Court believes that plaintiff honestly believed that he was being treated unfairly, and it may well be that he was being treated unfairly because it may be true that he should have been evaluated by persons who would have had a better understanding of his work or persons who were more familiar with his work. But plaintiff cannot prevail in this case simply because he may have been or even, in fact, was treated unfairly. Plaintiff must prove that this "unfair" treatment was because of his race or national origin. And this Court is not persuaded that those who evaluated him; that is, those who gave him his poor performance rating, did so because plaintiff was black or Nigerian.

However, most important to this Court's decision is not plaintiff's relationship with persons other than Mr. Kohnen between 1986 and 1990, but what was Mr. Kohnen's motivation to terminate plaintiff in August of 1991. In this Court's opinion,, plaintiffs problems with Norton or others, between 1986 and 1990, did not play any part in Mr. Kohnen's

decision to terminate him in August of 1991. This Court finds Mr. Kohnen to be a credible witness. It would have been easy for him to deny many of the things that plaintiff's counsel suggested happened or statements that were -made either by Mr. Kohnen or in his presence, but rather than simply deny that those things were said by others or said by him, Mr. Kohnen, in this court's opinion, truthfully stated that he could not recall such a statement being made or that he didn't believe such statements were made. And this Court finds that his testimony is believable, that he, Mr. Kohnen, did not allow race or national origin to play any part in the decision to discharge plaintiff; that is, that neither race or national origin played any part in the motivation and the reasons why Mr. Kohnen Made the decision to terminate plaintiff in August of 1991. Furthermore, this Court is satisfied that neither race nor national origin played any part in Mr. Kohnen's decision not to hire his back as a contract employee.

Furthermore, this court is satisfied that Mr. Kohnen's decision to terminate the plaintiff was not in any way based on any retaliation or any complaint that plaintiff had made to anyone.

In sum, it is the conclusion of this Court that the decision to terminate plaintiff, in August of 1991, was a decision made by Mr. Kohnen based on budgetary reasons and that neither plaintiff's race nor his national origin played any part in the decision to terminate him in August of 1991 or any decision not to hire him as a contract employee.

DATED at Chicago, Illinois, this 22 day of May, 1997.

For these reasons, the Court hereby finds in favor of the defendant and against the plaintiff. A judgment in favor of defendant shall be entered.

/s/ Patrick J. Duggan
United States District Judge